FILED

93 1090 JAN 3 1994

No. 93-___ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

BRYANT MILLSAPS, et al.,

Appellants,

v.

PHILLIP R. LANGSDON, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Tennessee

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the district court err in declaring as a matter of law on summary judgment that a state legislative reapportionment plan with a 13.9% deviation per se violates the equal protection clause based upon hypothetical plan with a 9.84% deviation, thereby precluding from consideration any justification for the deviation?

2. Where a state supreme court modified a state constitutional policy prohibiting the division of counties in forming state house districts by permitting a state legislature to determine which 30 of the state's 95 counties may be divided in reapportioning such districts in order to justify a constitutionally acceptable deviation of 13.9%, does a federal district court have the power to intrude upon that state reapportionment process by redefining the state policy in order to declare a plan which meets those standards unconstitutional as a matter of law?

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OPINION BELOW

The opinion and order of the three-judge court granting the motion for summary judgment (App., *infra*, at 7a) is not reported. The order of the three-judge court denying the motion to alter or amend (App., *infra*, at 5a) is also not reported.

JURISDICTION

The three-judge court issued an opinion and order granting the plaintiffs' motion for summary judgment (App., *infra*, at 7a) on September 15, 1993. A motion to alter or amend was filed on September 27, 1993. That motion was denied with respect to the granting of summary judgment in an order (App., *infra*, at 5a) on October 5, 1993. A notice of appeal was filed on November 3, 1993. (App., *infra*, at 1a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The equal protection clause of the Fourteenth Amendment of the United States Constitution provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The relevant portions of Chapter 836 of the Tennessee Public Acts of 1992, which reapportions the Tennessee House of Representatives, are set forth in the Appendix, *infra*, at 20a.

Article II, Section 5 of the Tennessee Constitution provides:

> The number of Representatives shall be ninety-nine and shall be apportioned by the General Assembly among the several counties or districts as shall be provided by law. Counties having two or more Representatives shall be divided into separate districts. In a district composed of two or more counties, each county shall adjoin at least one other county of such district; and no county shall be divided in forming such a district.

STATEMENT

I. Prior Reapportionment Litigation in Tennessee

Reapportionment litigation in Tennessee began more than 30 years ago with the landmark decision of *Baker v. Carr*, 369 U.S. 186 (1962) in which a challenge to the reapportionment of the Tennessee House of Representatives was held to be a justiciable issue. Since that case, such litigation has occurred after each decennial census. *See, e.g., Kopald v. Carr*, 343 F. Supp. 51 (M.D. Tenn. 1972); *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982) (*Lockert I*); *Lincon County v. Crowell*, 701 S.W.2d 602 (Tenn. 1985).

By the 1980's, the focus of reapportionment litigation had shifted in Tennessee from the issue of "one person, one vote" in federal court to the question of maintaining county boundaries in state court. The Tennessee Constitution provides that no county may be divided in forming a multi-county house district. Tenn. Const., art. II, sec. 5. In

State ex rel. Lockert v. Crowell, 656 S.W.2d 836 (Tenn. 1983) (*Lockert II*), the Tennessee Supreme Court implicitly acknowledged that it was impossible to reconcile Tennessee's constitutional mandate against dividing counties and the requirements of the equal protection clause. In that case, the proof revealed that a plan that divided no counties in forming multi-county house districts would create a maximum population deviation of 65.9%. *Lockert II*, 656 S.W.2d at 843. Thus, it is impossible to fully comply with both the Tennessee and United States Constitutions at the same time.

The issue in *Lockert II* then became the extent to which the Tennessee Constitution must be followed in reapportioning the Tennessee House of Representatives. Based upon two hypothetical plans, which divided 26 counties with a 13.81% deviation and divided 33 counties with a 9.30% deviation, the trial court in *Lockert II* found as fact that "the Legislature can adopt a House plan with a ten percent or less maximum gross deviation from the one person, one vote optimum and divide only 25 counties." *Lockert II*, 656 S.W.2d at 844. The Tennessee Supreme Court rejected the trial court's holding stating the following:

> If the Legislature proceeds in good faith, and puts compliance with Federal and State Constitutions above political considerations and the resulting plan has a 13.6% or 14.0% deviation, we believe it will be safe from attack, although admittedly it will not have the de minimis presumption that a 10% plan would have. The risk of having to defend a plan was alluded to by the Chancellor [trial court], in support of his 10% limit, but our view is that the suit-risk factor is a

> matter for Legislative discretion. The result is that we raise the 10% limit to 14% total deviation, applicable to both the Senate and the House.
>
> Turning to the limitation on dividing counties in creating House districts, we think an upper limit of dividing 30 counties in the multi-county category is appropriate, with the caveat that none of the thirty can be divided more than once.

Lockert II, 656 S.W.2d at 845. Thus, the Tennessee Supreme Court established a state policy which afforded the legislature some legislative discretion in the reapportionment of the state house.

Subsequent to the *Lockert II* decision, the Tennessee legislature enacted Chapter 778 of the Tennessee Public Acts of 1984. This plan complied with the *Lockert II* standards by dividing 29 counties with a deviation of 13.95%, but it was challenged in federal court as violative of "one person, one vote". In the case of *Murray v. Crowell*, No. 84-0566 (M.D. Tenn. 1985) (App. 16a et seq.), a three-judge panel upheld the constitutionality of Chapter 778 stating from the bench that "[i]t seems . . . that the policy stated in the *Lockert* opinion by the State Supreme Court reflecting what it considers to be the traditions and constitutional demands in light of reapportionment cases is not an unhappy solution to a difficult problem." App., *infra*, at 26a.

Other litigants did not view Chapter 778 as a "happy solution" and challenged the plan in state court arguing that at least one county was unnecessarily divided because a plan could have been drawn without dividing

that county while not increasing the overall deviation of the plan. *See Lincoln County v. Crowell*, 701 S.W.2d at 603. In responding to this argument, the Tennessee Supreme Court stated that:

> In the second opinion in the *Lockert* case, *supra*, this Court recognized that exact mathematical equality was not possible and also recognized that it would be necessary to cross some county lines in order to achieve acceptable levels of population in the respective districts in accordance with federal requirements. The Court allowed considerable tolerance to the General Assembly in adopting a reapportionment plan, recognizing that county lines and even voting precincts have not been drawn in accord with district mathematical equality in population.

Id. at 604.

The challenge to Chapter 778 under the Tennessee Constitution was rejected by the Tennessee high court and the plan was upheld. Even though the Tennessee Supreme Court was fully aware of hypothetical plans in the *Lockert II* and *Lincoln County* cases which divided fewer counties with smaller deviations, it still interpreted the Tennessee Constitution so as to allow the Tennessee General Assembly a certain amount of "tolerance" in effectuating the state constitutional mandate against dividing counties in order to justify a population deviation above a de minimis level.

II. Enactment of 1992 Tennessee House Reapportionment Plan

After the 1990 Federal Decennial Census, the Tennessee General Assembly fulfilled its constitutional obligation to reapportion the Tennessee House of Representatives by the enactment of Chapter 836 of the Tennessee Public Acts of 1992. The following guidelines were adopted by the House Reapportionment Subcommittee and ultimately included in the preamble to the act:

> 1. Each district will be represented by a single member.
>
> 2. Districts must be substantially equal in population in accordance with the constitutional requirements for "one person, one vote."
>
> 3. The geographic areas, boundaries and population counts used for redistricting shall be the 1990 Federal Decennial Census.
>
> 4. Districts must be contiguous and contiguity by water is sufficient.
>
> 5. No more than 30 counties may be split to attach to other counties or parts of counties to form multi-county districts.
>
> 6. The redistricting plan will comply with Voting Rights Act and the Fourteenth and Fifteenth Amendment to the United States Constitution.

See Chapter 836, App. at 20a-21a.

Chapter 836 fully complies with all of these guidelines. All 99 of the house districts under Chapter 836 are single member districts. The maximum population deviation between the largest and smallest district is 13.90% based upon the 1990 Federal Decennial Census. All of the

house districts are contiguous. A total of 30 counties are divided in forming multi-county districts. Finally, Chapter 836 increased the number of majority-black districts from nine under the prior reapportionment plan to eleven such districts. It should also be noted that a majority-white district in Knox County elected a black candidate in 1992 under Chapter 836.

The legislative debates regarding the enactment of Chapter 836 reflect an intention of the Tennessee legislature to follow the guidelines established by the *Lockert II* case in compliance with state and federal law. In particular, Representative L. Don Ridgeway, one of the sponsors of the law, stated the following during the floor debates:

> The proposed plan protects the integrity of county boundaries consistent with the State and Federal requirements of "one person, one vote", and the Tennessee Supreme Court's decision in *Lockert v. Crowell*. The plan complies with the *Lockert* decision by not splitting more than 30 counties in the multi-county district category. The plan contains a maximum population deviation of just under 14% recognizing again the Tennessee Supreme Court in the Lockert decision indicating approval of a redistricting plan with a population deviation as high as 14% in order to preserve the integrity of county boundaries.

Chapter 836 took effect in May 1992 for the August 1992 primary and November 1992 general elections.

III. District Court Decision

This case was consolidated for trial with the case of *Rural West Tennessee African-American Affairs Council, Inc., et al. v. Ned R. McWherter, et al.*, No. 92-2407 (W.D. Tenn.

1993) (*Rural West Tennessee*) since both cases involved a challenge to Chapter 836. In addition to the challenge under the equal protection clause, the plaintiffs in this case raised a challenge under Section 2 of the Voting Rights Act. The claims raised in the *Rural West Tennessee* case were under Section 2 as to both the Tennessee House of Representatives and Senate reapportionment plans for 1992. On June 20, 1993, the first day of trial of the consolidated cases, the three-judge panel granted from the bench the plaintiffs' motion for summary judgment under the equal protection clause. A written opinion and order was entered on September 15, 1993, in which the district court set forth its reasons for granting the summary judgment. App., *infra*, at 7a.

The basis for the three-judge panel's opinion was the existence of a hypothetical plan drawn by the plaintiffs which divided 27 counties in forming multi-county districts with a deviation of 9.84%. In light of this plan, the district court concluded that "[i]t is patently unreasonable to justify a 14% variance on the basis of not splitting county lines when fewer counties may be split while simultaneously decreasing that variance below the 10% goal." App., *infra*, at 17a. The three-judge panel also stated that the "[d]efendants failed to obey the mandate of the state's highest court to enforce Tennessee's constitutional prohibition on splitting county lines 'insofar as is possible.' " App., *infra*, at 14a. Finally, district court held that "[f]or purposes of our case the Tennessee Legislature should stay with a 10% deviation from district to district while breaking as few county lines as is reasonably possible." App., *infra*, at 10a. Since the district court held the plan violative of the equal protection clause, it did not

rule on the Section 2 challenge brought to Chapter 836 by both sets of plaintiffs in the consolidated cases.

THE QUESTIONS ARE SUBSTANTIAL

In determining whether Chapter 836 complies with "one person, one vote", the three-judge panel focused on some but not all of the principles enunciated by this Court with regard to legislative reapportionment. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the equal protection clause was held to require states to reapportion both houses of their legislatures according to population. However, this Court further indicated, as noted by the district court in this case, that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." App., *infra*, at 10a quoting *Reynolds*, 377 U.S. at 579. As for the exact parameters, this Court left the issue to develop on a case-by-case basis stating:

> What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative reapportionment.

Reynolds, 377 U.S. at 578.

By the early 1970's, this Court had established a de minimis principle of permitting a deviation of 10% between the largest and smallest districts. *White v. Regester*, 412 U.S. 755 (1973) (Texas state legislative redistricting plan with a deviation of 9.9% was presumed valid with the burden upon the plaintiffs to show invidious discrimination). As for deviations above 10%, the three-judge panel correctly cited to this Court's two-part test in *Mahan v. Howell*, 410 U.S. 315, 326 (1973) which states "whether it can reasonably be said that the state policy . . . is, indeed, furthered by the plan adopted by the legislature, and whether, if so justified, the divergences are also within tolerable limits." App., *infra*, at 10a-11a.

From this test in *Mahan*, the district court in this case concluded that since a hypothetical plan was drawn by the plaintiffs which divided 27 of the state's 95 counties in forming multi-county districts with a deviation of 9.84%, then summary judgment should be granted to the plaintiffs because Chapter 836 could not be said reasonably to further the state's rational policy regarding the division of counties. Such a conclusion violates two important principles sufficient to make the issues in this case appropriate for this Court to note probable jurisdiction.

The first principle is that by misinterpreting the state policy on dividing counties, to be discussed *infra* at 14, the three-judge panel precluded from consideration as a matter of law any justification offered for the deviation. Such a holding by the district court reduces analysis of these cases to a wholly mathematical exercise. Non-mathematical factors, such as the state policy affording discretion to the legislature to decide which 30 counties

should be divided, was not considered by the district court for any deviation over 10%.

In the last term, this Court was presented with a state legislative reapportionment plan with a population deviation in excess of 10% in the case of *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). The district court in the *Voinovich* case held the plan to be in violation of "one person, one vote" without permitting the defendants the opportunity to introduce any evidence to justify the deviation. In reversing the district court's holding, Justice O'Connor, in a unanimous opinion, stated the following:

> Here, the District Court found that the maximum total deviation from ideal district size exceeded 10%. App. to Juris. Statement 148a. As a result, appellees established a prima facie case of discrimination, and appellants were required to justify the deviation. Appellants attempted to do just that, arguing that the deviation resulted from the State's constitutional policy in favor of preserving county boundaries. *See* Ohio Const., Arts. VII-XI. The District Court therefore was required to decide whether the "plan 'may reasonably be said to advance [the] rational state policy' " of preserving county boundaries "and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of th[e] plan exceed constitutional limits.' " *Brown, supra*, at 843, 103 S.Ct. at 2696 (quoting *Mahan v. Howell*, 410 U.S.315, 328, 93 S.Ct. 979, 986, 35 L.Ed.2d 320 (1973)). Rather than undertaking that inquiry, the District Court simply held that total deviations in excess of 10% cannot be justified by a policy of preserving the boundaries of political subdivisions. Our case law is directly to the contrary. *See Mahan v.*

> *Howell, supra* (upholding total deviation over 16% where justified by the rational objective of preserving the integrity of political subdivision lines); *see also Brown v. Thomson,* supra. On remand, the District Court should consider whether the deviations from the ideal district size are justified using the analysis employed in *Brown, supra,* 462 U.S. at 843-846, 103 S.Ct., at 2696-2697 and *Mahan, supra,* 410 U.S., at 325-330, 93 S.Ct. at 985-987.

Id. at 1159. Like the district court in *Voinovich,* the three-judge panel in this case granted summary judgment and thereby precluded as a matter of law any consideration of nonmathematical justifications which the state might and did offer.

In determining whether a plan reasonably furthers a rational state policy to justify a deviation above 10%, this Court has held that "consideration must be given 'to the character as well as the degree of deviations from a strict population basis.' " *Brown v. Thomson,* 462 U.S. 835, 845 (1983), quoting *Reynolds,* 377 U.S. at 581. In *Brown,* this Court was confronted with a challenge to the reapportionment plan for the Wyoming House of Representatives. The Wyoming Constitution provided that each county was entitled to at least one representative. *Id.* at 839. A challenge was brought to the allocation of one representative to Niobrara County, the state's least populous county which created a deviation of 90%. In rejecting the challenge, this Court in looking at the "character of the deviation" stated that "[t]he consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state

legislative apportionment plan contravenes the Equal Protection Clause." *Id.* at 845-46.

There is no doubt that the *Brown* case was a unique one. Indeed, Justice O'Connor stated, in her concurring opinion, that she had the "gravest doubts that a statewide legislative plan with an 89% maximum population deviation could survive constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries." *Brown*, 462 U.S. at 850 (O'Connor, J., concurring). The point is, however, that each case must be judged on its own particular facts considering both the "character as well as the degree of the deviation". *Reynolds*, 377 U.S. at 1390 ("Developing a body of doctrine on a case-by-case basis appears to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative reapportionment.")

The three-judge panel did not consider the "character as well as the degree of the deviation." In fact, the holding of the district court automatically precluded consideration of any evidence regarding the consistent and neutral way in which the state policy of maintaining the integrity of political subdivisions is effectuated through Chapter 836. Furthermore, the defendants were not given the opportunity to introduce any evidence about the plantiffs' hypothetical plan which the defendants contend not only does not further the state policy regarding the division of counties by dividing certain counties which the Tennessee legislature made a determination not to divide, but the hypothetical plan runs afoul of the Voting Rights Act by packing some majority-black districts with black voting age population as high as 95% while other

majority-black districts in Nashville would regress from 65% black voting age population to 53% if implemented.

This failure to consider the "character of the deviation" leads to the second important principle which the district court violated in reaching its conclusion that Chapter 836 violates the equal protection clause. In order to reach that result, the three-judge panel redefined the state policy regarding the division of counties in reapportioning the Tennessee House of Representatives and thereby breached the important doctrine of federalism by interfering with the state reapportionment process. In the case of *Growe v. Emison*, 113 S.Ct. 1075 at 1080 (1993), this Court in the last term stated that it "has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." The *Growe* case involved the question of whether a federal court should abstain in a reapportionment case where there is a pending state court reapportionment case on the same reapportionment plan. In this case, the Tennessee Supreme Court has already addressed that "highly political task" by defining the state policy regarding the division of counties in the 1980's in the *Lockert II* and *Lincoln County* cases.

Yet the district court, in order to reach the conclusion that Chapter 836 did not reasonably further that policy redefined the policy so as to "break as few county lines as is reasonably possible" and "stay within a 10% deviation." App., *infra*, at 10a. This conclusion is directly contrary to the holding of the Tennessee Supreme Court in the *Lockert II* and *Lincoln County* cases and thereby

intrudes upon the state legislative reapportionment process. It is undisputed that a reapportionment plan cannot be drawn which divides no counties and meets the mandates of the equal protection clause. *Lockert II*, 656 S.W.2d at 843 (Exhibit 17 divides no counties with a deviation of 65.9%).

The issue for the Tennessee Supreme Court became what effect, if any, can be given to the Tennessee Constitution. The Tennessee high court determined that 30 counties could be divided with a population deviation of up to 14% even though plans with lower deviations and fewer counties divided existed. *Lockert II*, 656 S.W.2d at 843 (Exhibit 18 divided only 26 counties with a deviation of 13.81%) and at 844 (Trial court made a finding of fact that a plan could be drawn with a deviation of 10% while dividing only 25 counties).

By redefining the state policy to require that as few counties as possible be divided and stay under 10% deviation, the three-judge panel has significantly restricted legislative discretion which the Tennessee Supreme Court afforded the legislature in effectuating that state policy. As the Tennessee Supreme Court noted in the *Lincoln County* case, it "allowed considerable tolerance to the General Assembly in adopting a reapportionment plan, recognizing that county lines and even voting precinct lines have not been drawn in accord with strict mathematical equality in population." *Lincoln County*, 701 S.W.2d at 604. That legislative discretion affords the Tennessee General Assembly some flexibility when determining which counties should or should not be divided in forming legislative districts.

For example, in Chapter 836 the Tennessee legislature made a determination that Carter County in upper east Tennessee with a population of 51,520 forms a natural single county district since the optimum population per district is 49,264. Because of the creation of that district in upper east Tennessee, the result is that adjacent Johnson County with a population of 13,766 must be attached to a segment of Sullivan County which is a multi-district county with a population of 143,596. The optimum population of each of the three Johnson/Sullivan county district is 52,454 which is 6.4% above the optimum district size, i.e., the combined populations of Sullivan and Johnson Counties divided by three.

Likewise, in Chapter 836 the Tennessee legislature decided that Gibson County with a population of 46,315 forms a natural single-county district with no other segments of counties attached to it resulting in a negative deviation of 5.98%. The result from these two examples is an overall deviation of 12.38% which is unacceptable to the three-judge panel since the plaintiffs drew a hypothetical plan with a lower deviation which divided fewer counties. Of course, Carter County was divided under the plaintiffs' plan, and a segment of a County adjacent to Gibson was attached to Gibson in order to maintain a negative deviation under 5%.

One of the major difficulties in legislative reapportionment is the lack of clear standards to guide a state legislature in fulfilling its constitutional obligations. In 1964, when the *Reynolds* case was decided, the standards were in the embryonic stages with the focus upon "one person, one vote". Indeed, this Court in *Reynolds* left the task of determining the parameters of the doctrine to the

lower courts which it felt could "work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation" with the caveat that "[w]hat may be marginally permissible in one State may be unsatisfactory in another." *Reynolds*, 377 U.S. at 578.

Almost 30 years have passed, and the Tennessee legislature, like many other states, must consider not only "one person, one vote", but also other mandates such as a state constitutional provision prohibiting the division of counties in forming multi-county districts. In addition, other requirements such as the Voting Rights Act not to mention geographic compactness and contiguity must also be followed. In 1983, the Tennessee Supreme Court in *Lockert II* gave the Tennessee legislature clear guidance as to what the Tennessee Constitution requires as the state policy regarding the division of counties in order to justify a constitutionally acceptable deviation, *i.e.*, no more than 30 counties may be divided with a deviation of up to 14%. That standard affords certainty for the Tennessee legislature in the reapportionment process.

More importantly, that standard provides the Tennessee General Assembly with some legislative discretion in determining which counties should or should not be divided in forming multi-county districts. In *Gaffney v. Cummings*, 412 U.S. at 2329, this Court noted that:

> [T]he goal of fair and effective representation [is not] furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make

> the political decision necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan.

By its decision, the three-judge panel has removed much of the task of reapportioning from the hands of the elected representatives of the State of Tennessee and made it a mathematical exercise.

The issues presented in this case are not necessarily unique to the State of Tennessee. At least 20 other states have some type of provision in their state constitution pertaining to maintaining the integrity of political subdivisions in reapportioning their legislative bodies. Those states include: Arkansas, California, Colorado, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, Vermont, West Virginia, and Wyoming. *See*, App., *infra*, at 33a for a description of each state's constitutional provision.

Although none of these state constitutional provisions are identical to Tennessee's provision, the fact remains that each state through its legislature and possibly judiciary must come to grips with how to effectuate its policy of maintaining the integrity of political subdivisions. The issues raised in this appeal, therefore, raise substantial federal questions which may impact a number of other states in the reapportionment process.

CONCLUSION

Probable jurisdiction should be noted and the motion for stay should be granted pending final resolution of this appeal.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PHILLIP R. LANGSDON,)
KENNETH L. LEWIS,)
MICHAEL A. MCCROSKEY)
and **E.E. REDDITT,**)
)
Plaintiffs,)
)
v.)
)
BRYANT MILLSAPS, Secretary)
of the State, **NED R.**)
MCWHERTER, Governor of the)
State of Tennessee, **CHARLES**)
W. BURSON, Attorney General)
and Reporter, **WILL BURNS,**)
State Election Coordinator,)
JAMES O. NAIFEH, Speaker of)
the House of Representatives,)
JOHN S. WILDER, Lieutenant)
Governor of the State Senate,)
and **THOMAS D. HILL, II,**)
CHARLIE R. ASHFORD,)
MICHAEL L. DUNCAN, LYTLE)
LANDERS, THOMAS C.)
WHEELER, Commissioners of)
the State Board of Elections.)
)
Defendants.)

No. 92-2415-TU
Chief Judge
Merritt
Judge Brown
Judge Turner

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed Nov. 3, 1993)

Notice is hereby given that the defendants, Bryant Millsaps, Secretary of State; Ned R. McWherter, Governor

of the State of Tennessee; Charles W. Burson, Attorney General and Reporter of the State of Tennessee; Will Burns, State Election Coordinator of the State of Tennessee; James O. Naifeh, Speaker of the House of Representatives; John S. Wilder, Lieutenant Governor of the State Senate; and Thomas D. Hill, II, Charlie R. Ashford, Michael L. Duncan, Lytle Landers, Thomas C. Wheeler, Commissioners of the State Board of Elections, the defendants above-named, hereby appeal to the Supreme Court of the United States from the order of the three-judge court dated October 5, 1993, denying the defendants' motion to alter or amend and also appeal from the order of the three-judge court granting *Langsdon* plaintiffs' motion for summary judgment dated September 15, 1993.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded on this 2nd day of November, 1993, via first-class United States mail, postage prepaid, to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PHILLIP R. LANGSDON, et al., Plaintiffs,	)	
v.	)	No. 92-2415-TUBRO
BRYANT MILSAPS, et al., Defendants.	)	

ORDER OF THREE-JUDGE COURT

(Filed Oct. 5, 1993)

The defendants have moved to alter or amend the Court's prior decision in this case of September 15, 1993, pursuant to Rule 59 of the Fed. R. Civ. P., on three grounds. The Court denies the first two grounds but grants the third ground as follows:

1. The Court denies the first and second grounds of the defendant's motion to alter or amend its prior decision of September 15, 1993. Neither of these two grounds was raised in the prior proceedings. The questions now presented were therefore waived. Moreover, it is clear from the decision of the Court on September 15, 1993, that the Court has placed no significant limitation on the authority or duty of the General Assembly to comply with the Voting Rights Act. The Court's actions should not be interpreted as a modification of the General Assembly's duty to comply with the Act or an instruction as to its duties under the Act. No such questions under the Act, or with respect to a claim of a census undercount,

were presented to the Court at trial or decided by the Court.

2. The Court grants the third ground of the defendant's motion to alter or amend its prior decision of September 15, 1993, and hereby changes the deadline by which the defendants must enact a plan from December 24, 1993, to January 25, 1994.

Accordingly, it is so ORDERED this 5th day of October, 1993.

ENTERED BY ORDER OF THE COURT

/s/ Gilbert S. Merritt
GILBERT S. MERRITT
UNITED STATES CHIEF CIRCUIT JUDGE

/s/ Bailey Brown
BAILEY BROWN
UNITED STATES SENIOR CIRCUIT JUDGE

/s/ Jerome Turner
JEROME TURNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., et al., Plaintiffs, v. NED McWHERTER, et al., Defendants.	No. 92-2415-TUBRO
PHILLIP R. LANGSDON, et al., Plaintiffs, v. BRYANT MILSAPS, et al., Defendants.	

OPINION AND ORDER OF THREE-JUDGE COURT GRANTING LANGSDON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
(Filed Sept. 15, 1993)

Before: MERRITT, Chief Circuit Judge; BROWN, Senior Circuit Judge, and TURNER, District Judge.

This case challenges Tennessee's most recent legislative reapportionment, effected by Chapter 836 of the Tennessee Public Acts of 1992. It arises under the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. A three-

judge panel has been convened pursuant to 28 U.S.C. § 2284.

The Langsdon plaintiffs seek a declaration that Chapter 836 is unconstitutional as to the lower house of the Tennessee legislature as well as an injunction against the holding of any further elections pursuant to its provisions. They contend that it violates the "one person, one vote" standards of the Fourteenth Amendment; that it constitutes illegal partisan gerrymandering; and that it violates the Voting Rights Act. This case has been consolidated for trial with Case No. 92-2407, *Rural West Tennessee African-American Affairs Council, et al., v. Ned R. McWherter, et al.* The primary question presented is whether an apportionment of the lower house which deviates 14% from district to district and breaks 30 county lines is invalid when plaintiffs have demonstrated that an apportionment which deviates less than 10% and breaks fewer county lines is possible.

I.

Chapter 836 was passed pursuant to Article II, Section 5 of the Tennessee Constitution, which governs apportionment of the state House electoral districts. It is based upon the results of the 1990 Federal Decennial Census. Tennessee's population under this count is 4,877,185 persons; the optimum (or average) population for each of the 99 House districts is thus 49,264. The House districts constructed by Chapter 836 have a maximum population deviation between the largest and smallest districts of 13.90%. (District 5, composed of parts of Unicoi and Washington Counties, has a variance of 6.99%

over the optimum of 49,264; District 31, composed of part of Hamilton County, has a variance of 6.91% under the optimum.) Forty-three of the 99 districts have variances greater than five percent above or below the optimum. The plan divides a total of 30 counties one time each in forming multi-county House districts. Plaintiffs have presented an alternative plan, for purposes of comparison, which has a total population variance of only 9.847% and splits only 27 counties in forming multi-county districts.

The legislature has extensive computer resources available to aid its redistricting efforts, including a dedicated GIS computer system with four Sun work stations, a color laser printer, a map plotter, a custom-designed software program, and trained staff to operate this system. Approximately $400,000 was budgeted by the legislature to purchase the system. In addition, all census data from the 1990 count were available in both hard copy and in computer readable format, as well as the Topologically Integrated Geographic Encoding and Referencing (TIGER) maps prepared by the Census Bureau. No such computerized system was available for reapportionment following the 1980 census.

II.

Federal Rule of Civil Procedure 56(c) directs a court to grant summary judgment to the moving party if that party can show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The facts as set forth above are not in dispute. The Supreme Court has spoken concerning applicable federal Constitutional standards. For

purposes of our case the Tennessee legislature should stay within a 10% deviation from district to district while breaking as few county lines as is reasonably possible. In *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), the Court explained the one person, one vote requirement as it applies to reapportionment of state legislative districts: "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." However, "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." *Id.* at 579. The Court applied these competing principles in *White v. Regester*, 412 U.S. 755 (1973), a challenge to the Texas state legislative redistricting plan. In a unanimous decision, the Court concluded that the "relatively minor" total population variance of 9.9% between the largest and the smallest districts, standing alone, did not violate the one person, one vote standard. *Id.* at 764.

A more difficult situation was presented in *Mahan v. Howell*, 410 U.S. 315 (1973). The Virginia General Assembly passed a redistricting statute in compliance with a new state constitutional provision requiring that the new districts keep political subdivisions intact. The resulting plan produced a population variance of 16.4% between the largest and smallest districts. The Court applied a two-part test: "whether it can reasonably be said that the state policy . . . is, indeed, furthered by the plan adopted

by the legislature, and whether, if so justified, the divergences are also within tolerable limits." *Id.* at 326. The Court concluded that the first prong was met because political subdivisions remained intact under the plan, with the exception of Fairfax County, which was split into two five-member districts. As to the second prong, the Court held that although the variance of 16.4% "may well approach tolerable limits, we do not believe it exceeds them." *Id.* at 329.

These three cases, read together, indicate a general three-part classification scheme for redistricting plans. Those plans producing a total population variance of 10% or less are *de minimus* violations of the one person, one vote standard, and a plaintiff cannot prevail on this evidence alone. Those plans producing a variance of more than 16.4% may be insupportable on any grounds. Those plans with a variance falling between those two boundaries establish a prima facie case of vote dilution, but may be justified by a plan that reasonably furthers a rational state policy. The challenged plan before us, with a variance of 13.9%, falls into this category. The problem with the reapportionment in this case is that its variance above 10% does not reasonably further a rational state policy.

In *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983) [*Lockert II*], the Tennessee Supreme Court applied the three-part test in a challenge to the state reapportionment following the 1980 census. The Tennessee Constitution provides that in multi-county districts, "each county shall adjoin at least one other county of such district; and no county shall be divided in forming such a district." Tenn. Const. art II § 5. The House redistricting plan under attack crossed 57 county lines and had a total deviation of

11.07%. The state trial court concluded that it would be possible, under the evidence before the court, to adopt a plan with a 10% or less maximum variance that divided only 25 counties. In its decision to modify these restrictions, the Tennessee Supreme Court expressed some misgivings with this conclusion: "Our interpretation of the proof in this record is that it may be very difficult to keep the total deviation in either body below 10% and remain close to the limits of State violations set by the Chancellor. . . . " *Id.* at 844. The court then relaxed the prescribed standards for reapportionment to a 14% maximum deviation and up to 30 split counties, opining that such a plan would be safe from attack, "although admittedly it will not have the de minimus presumption that a 10% plan would have." *Id.* The court admitted, however, that it could not guarantee that such a plan would pass federal Constitutional muster: "the suit-risk factor is a matter for Legislative discretion." *Id.*

The legislature complied, producing a plan with 13.95% total deviation that split 30 counties. A challenge in federal court followed. In *Murray v. Crowell,* No. 3:84-0566 (M.D. Tenn. March 8, 1985), a three-judge court determined that the new plan constituted a prima facie case for violation of the one person, one vote standard, since it produced a total variance greater than 10%. The court then considered in great detail the rational underpinnings of the state policy of minimizing the breaking of county lines, and concluded that the plan reasonably furthered that rational policy. There was no mention in the opinion from the bench of any alternate plan presented to the court which might have diminished either the number of county boundaries violated or the total

deviation from the one person, one vote standard. Computer technology used in the drafting of plans was not so advanced in the early 1980s as today, and no plan coming within the 10% total deviation figure was presented to the *Murray* court.

III.

Against this backdrop, we examine the case before us. Defendants rely heavily on the *Lockert II* and *Murray* cases. They contend that the Tennessee Supreme Court carefully balanced the State's rational interest in keeping county lines intact, as mandated by the state constitution, against the federal Constitutional requirement of compliance with one person, one vote, and came up with a limit of 14% total variance and 30 split counties. When the *Murray* court approved the plan, according to defendants, they necessarily affirmed the federal Constitutional validity of the numerical limits set by the *Lockert II* court, creating a "safe harbor" that should protect the plan before us.

This argument misses the point of the three-part test. It fails under a careful reading of the *Lockert II* opinion itself. The *Lockert II* court expressly reaffirmed its holding from *Lockert I*, 631 S.W.2d 702 (Tenn. 1982), that "the State's constitutional prohibition against crossing county lines must be enforced insofar as is possible and . . . any apportionment plan adopted must cross as few county lines as is necessary to comply with federal constitutional requirements." 656 S.W.2d at 838. Defendants unquestionably have failed under this standard. First, even if we

were to accept without question a total population variance of 14%, raising the *de minimus* threshold from the 10% level established by the U.S. Supreme Court, plaintiffs have presented a plan that would not exceed this level and would split fewer counties than Chapter 836. Defendants have failed to obey the mandate of the state's highest court to enforce Tennessee's constitutional prohibition on splitting county lines "insofar as is possible."

Second, *Lockert II* stressed the paramount nature of federal Constitutional requirements throughout: "This Court is not persuaded . . . by defendants' arguments that we should sanction a single county line violation not shown to be *necessary to avoid a breach of federal constitutional requirements,*" 656 S.W.2d at 839; "the State Constitution must yield [to avoid a total variance of 21.9%]", *id.*; "only one fractional segment of each county [Knox and Davidson] need be detached and joined with other counties to reduce the over population deviation to limits *acceptable under federal law.*", *id.* at 841 (emphasis supplied).

Finally, nowhere in the *Lockert II* opinion does the court purport to establish an absolute numerical standard, applicable in all redistricting contexts. On the contrary, the opinion sets forth in great detail the factual findings of the chancellor below concerning the population deviations for particular districts and the counties from which they were formed, under both the challenged state plan and alternative plans, 656 S.W.2d at 842-43. Each of these findings necessarily was based on population figures from the 1980 census, figures that are no longer either accurate or relevant. The guidelines imposed by the *Lockert II* court when it directed the

legislature to try again necessarily were limited to the particular circumstances of the case. The very paragraph in which the court approved a 14% total variance begins with the limiting words, "Our interpretation of the proof *in this record* is that it may be very difficult to keep the total deviation in either body below 10% and remain close to the limits of State violations set by the Chancellor. . . . " 656 S.W.2d at 844 (emphasis supplied). It is true, as defendants point out, that the *Lockert II* court loosened the standards imposed by the court below of 10% deviation and 25 split counties. But as the passage just quoted indicates, there was some question as to whether such a plan would be possible on the evidence in the record.

Neither may defendants rely on the *Murray* decision. That opinion concentrated almost completely upon the rational basis for the state's policy of not breaking county lines; there was no discussion concerning why the challenged plan reasonably advanced that goal. The *Murray* court's approval of the legislative redistricting plan at issue in that case was limited to the record before it, and does not control the outcome of this case. No alternate plan was presented staying within the 10% variance figure and breaking fewer than the 30 counties that *Lockert II* suggests should be the applicable state policy.

There is further justification for revisiting the 10%-deviation, 30-county issue. Redistricting methodologies have changed dramatically in the last decade. The legislature's new $400,000 computer system replaced a system of pencil, paper and pocket calculator, allowing a drop in the time required to produce plans that may satisfy the one person, one vote requirement. As the Supreme Court noted in *Karcher v. Daggett*, 462 U.S. 725, 733 (1983),

"rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has." This is even more true today. Witnesses in this consolidated case testified to preparing state-wide plans in a matter of hours.

Defendants contend that our ruling imposes upon them a new standard, akin to a "least restrictive means" analysis. As long as someone, somewhere can come up with a "better" plan than the legislature enacts, i.e., one that splits one fewer county or has a population variance one tick lower, then the state's plan may be stricken as unconstitutional. This is not what we have in mind.

We are not disturbed by the prospect of the State being subjected to pressure to obey both the U.S. Supreme Court directive to "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practical," *Mahan*, 410 U.S. 326, 985 (*quoting Reynolds*, 377 U.S. at 577), and its own highest court's mandate to "cross as few county lines as is necessary to comply with federal constitutional requirements," *Lockert II*, 656 S.W.2d at 838. To the extent that this is a hardship, it is one imposed by the two documents defendants are sworn to uphold, the state and federal Constitutions.

We do not interpret the U.S. Supreme Court's decisions to require that the legislature devote every last iota of its scarce time and resources toward drawing the *best* plan possible. The Supreme Court's three-tiered classification scheme for evaluating state apportionment plans provides some leeway. As long as the total population

variance is less than 10%, and there is no showing of bad faith on the part of the legislature, the plan will be presumed valid under the one person, one vote standard. Had Chapter 836 produced a variance of 9.9% instead of 13.9%, and assuming no allegation of bad faith, we would be far less interested in alternative plans with lower variances. The *Murray* court required only that the apportionment plan *reasonably* further the state's rational interest, and even this level of scrutiny may be avoided as long as the 10% threshold is not crossed. It is patently unreasonable to justify a 14% variance on the basis of not splitting county lines when fewer counties may be split while simultaneously *decreasing* that variance below the 10% goal.

We echo the *Murray* court's finding that Tennessee's constitutional provision against splitting counties is a rational state policy to be considered in its apportionment legislation. As the *Lockert II* court pointed out, however, this policy must yield to the one person, one vote doctrine, as well as to the requirements of the Voting Rights Act. 656 S.W.2d at 844. We turn now to fashioning an appropriate remedy.

IV.

For the reasons stated, we hold that Chapter 836 of the 1992 Tennessee Public Acts violates the one person, one vote doctrine under the Equal Protection Clause, and is therefore unconstitutional. We enjoin defendants from conducting any further elections pursuant to its district boundaries. Defendants must prepare and submit a new apportionment plan that satisfies the one person, one

vote standard. Any upward deviation from a total population variance of 10% must be justified by a rational state interest, such as to comply with the state's prohibition on splitting counties or to prevent the dilution of minority voting strength. Plaintiffs have demonstrated that it is possible to construct a plan that has a population variance of less than 10%, splits only 27 counties. A proposed plan from the legislature that exceeds a population variance of 10% will be invalid if it does not reasonably further rational state interests such as those recognized in *Lockert II* at least as well as plaintiffs' alternative plan.

The legislature should prepare and submit a new plan by December 24, 1993. This will allow the parties and court approximately two months to review the plan prior to March 19, 1994, the minimum time needed prior to the May 19, 1994 filing deadline for the public and potential candidates to receive notice of the district lines which will form the new apportionment plan. We are confident defendants will be able to meet the deadline we have imposed. The Supreme Court has "repeatedly held that redistricting and reapportioning legislative bodies is a legislative task, which the federal court should make every effort not to preempt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). We recognize that "judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds*, 377 U.S. at 586. In the unlikely event defendants fail to enact a constitutional apportionment plan, we will be faced with the unhappy task of devising one, perhaps by "using the best parts of . . . proposed plans." *Id.*

Accordingly, IT IS SO ORDERED this 15th day of September, 1993.

/s/ Gilbert S. Merritt
GILBERT S. MERRITT
UNITED STATES CHIEF
CIRCUIT JUDGE

/s/ Bailey Brown
BAILEY BROWN
UNITED STATES SENIOR
CIRCUIT JUDGE

/s/ Jerome Turner
JEROME TURNER
UNITED STATES DISTRICT
JUDGE

PUBLIC ACTS, 1992

CHAPTER NO. 836

SENATE BILL NO. 2128

By Rochelle

Substituted for: House Bill No. 2086

By Ridgeway, Purcell, DeBerry

AN ACT To amend Tennessee Code Annotated, Title 3, Chapter 1, relative to the composition of House of Representatives districts.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

Section 1. Tennessee Code Annotated, Section 3-1-103, is amended by deleting the section in its entirety and by substituting instead the following:

(a)(1) All census descriptions, counties, voting districts (VTDs), tracts, blocks, census delineations, census district lines and other census designations are those established for or by the United States Department of Commerce, Bureau of the Census, for taking the 1990 federal decennial census in Tennessee as contained in the automated geographic data base, known as the TIGER (Topologically Integrated Geographic Encoding and Referencing) System.

(2) All subdivisions listed under a county are voting districts (VTDs) unless labeled as tracts and blocks.

(b) It is the intention of the General Assembly that:

(1) Each district be represented by a single member;

(2) Districts must be substantially equal in population in accordance with constitutional requirements for "one person one vote";

(3) Geographic areas, boundaries, and population counts used for redistricting shall be the 1990 federal decennial census;

(4) Districts must be contiguous and contiguity by water is sufficient;

(5) No more than thirty (30) counties may be split to attach to other counties or parts of counties to form multi-county districts; and

(6) The redistricting plan will comply with the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution.

(c) Until the next enumeration of qualified voters and apportionment of representatives, the state House of Representatives shall be composed as follows:

[Subsection (c) contains the block/tract census data assignments for all 99 house districts which has been omitted due to that fact that such data is of a technical nature and would be of no assistance to this Court.]

(d) Nothing in this section shall be construed as depriving any member of the House of Representatives of the Ninety-seventh General Assembly of such member's office, or as affecting or modifying the constitutional requirements of the provisions of Article II, Section 3 of the Constitution of Tennessee. At the November, 1992 general election, and thereafter until changed by law, representatives shall be elected

to represent the districts as constituted and provided by this section. If the seat of a member of the House of Representatives becomes vacant prior to the general election in which a representative is to be elected to represent the district as constituted and provided by this section, in accordance with Article II, Section 15 of the Constitution of Tennessee, a successor shall be elected by the county legislative body to represent the district.

(e) It is the legislative intent that all House of Representatives districts shall be contiguous and, toward that end, if any enumeration or voting district or other geographical entity designated as a portion of a district is found to be noncontiguous with the larger portion of such district, it shall be constituted a portion of the district smallest in population to which it is contiguous.

(f) Any reapportionment of county legislative bodies shall not affect these legislative districts.

SECTION 2. The Tennessee Code Commission is hereby directed and authorized to arrange in paragraphs the precincts, tracts and blocks in the description of districts contained herein and is further directed to use the full name of such precincts in accordance with the official designation of such precincts by the Department of Commerce, Bureau of the Census as contained in the TIGER System, rather than any abbreviations which resulted from the reports generated by the legislative computer system utilized in the redistricting process.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: April 23, 1992

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ED MURRAY, et al.,	CIVIL CASE NO. 3:84-0566
Plaintiffs,	Nashville, Tennessee
v.	March 8, 1985
	9:00 a.m.
GENTRY CROWELL, et al.,	
Defendants.	ORIGINAL

TRANSCRIPT OF RULING

BEFORE THE HONORABLE GILBERT S. MERRITT
BEFORE THE HONORABLE H. THEODORE MILBURN
BEFORE THE HONORABLE THOMAS A. WISEMAN, JR.

APPEARANCES:

For the Plaintiffs:	William R. Willis, Jr., Esq. Alfred H. Knight, Esq.
For the Defendants:	Robert T. Rochelle, Esq. Robert L. Perry, Jr., Esq. Michael W. Catalano, Esq. William Farmer, Esq.
For the Intervenors:	Henry Haile, Esq. Victor Ashe, Esq.
Official Court Reporter:	John W. Tummel, RPR 801 Broadway, Rm. A839 Nashville, Tn 37203

JUDGE MERRITT: The Court has conferred about this case while it has been going on and has been giving thought to it beforehand and the Court is ready to rule and we will give our opinions in English style. I'll

announce the Courts' ruling and my reasoning and then Judge Milburn and Judge Wiseman will give their views about the matter. Our unanimous view on the result of the case is that the plan adopted by the Legislature as Plan A is constitutional.

Let me explain my own reasoning about that just briefly. I think, one, the language of the Supreme Court as found in different places, the general principle, as quoted in Mr. Farmer's brief from White v. Register which is on page 8 of his pre-trial brief, the quotation is on page 9, we find this language that variances over 10% but less 16.4% create a prima facie case of invidious discrimination and must be justified by a rational State policy which is reasonably advanced by the particular plan while remaining within permissible constitutional limits that sets the kind of framework – outer framwork [sic] – for looking at this case.

I think that Mr. Knight has put his finger on a crucial question – legal question – in the case – Mr. Farmer as well – and that is whether rational State policy as used in this language here and in other opinions means simply State Legislature policy or does it mean a rational State policy carved out by the State legal process which is or may be different from purely a legislative policy.

My own view is that, first, the language that the Supreme Court used here is rational State policy, it's not limited to only a legislative policy and, therefore, that we are not inhibited by the Supreme Court language from looking at what seems to me to be reasonable and that's the whole policy of the State taking into account the constitutional interplay among the three separate

branches of the State government. Here we have a legislative plan which has been adopted pursuant to guidelines on principles established by the judicial process in the State which is a reflection of – as best the State Supreme Court Justices can state it – a reflection of and an expression of the traditions and values as found in the Constitution of the State as reflected in the traditions of the State over a long period of time.

So it seems to me that on the question that Mr. Knight raises of whether we are limited or whether the Supreme Court's language and whether the Federal Court's [sic] ought to be limited to a legislative policy is – or should be answered in the negative in that we should look to the whole State policy to see whether it's a rational policy.

Now, having said that, it seems to me that the policy stated in the Lockert opinion by the State Supreme Court reflecting what it considers to be the traditions and the constitutional demands in light or [sic] reapportionment cases is not an unhappy solution to a difficult problem. They have looked to the Constitution itself – that is the State Constitution itself in which they find language that's very clear concerning the divison [sic] of counties. They have looked to the traditions of the State for many years which is in line with that same constitutional language. And they have in addition stated a policy that even where reapportionment requires splitting a county that it shall not be split more than once.

All of those general principles enunciated by the Tennessee Supreme Court in Lockert do seem to me to be an expression of State laws – constitutions and traditions – and not to be based upon arbitrary reasoning.

The question, though, then becomes is this – having found that a whole State policy by the whole State legal process is permissible and doesn't have to be just a legislative policy and that the conclusion and the reaching of that policy by the State Supreme Court has not been by an arbitrary process. The question, then, is to look at it to see whether it's rational and by rational, we don't mean it is a policy that we might reach ourselves. We don't look to see if it's true, but whether it commends itself to reason, that is, does it – is it plausible and it seems to me that the policy is rational in that sense; that it's a plausible policy that addresses itself to reason. I say that because I think very helpfully that Mr. Farmer in his brief on page – beginning on page 26 stated the reasons – provides three reason [sic] that one would want to adhere where possible to county lines and those three reasons all seem to be persuasive rationally based reasons.

The first is keeping counties whole, forming legislative districts inhibits gerrymandering or as the Supreme Court in Reynolds stated, quote, indiscriminate districting without regard for political subdivisions or natural or historical lines may be little more than an open invitation to partisan gerrymandering.

It seems to me that that reasoning incorporates its volatility argument that the county lines provides [sic] some stability that inhibits frequent reapportionment by an incumbent or by some purely political reason intends to provide stability.

So I think that is the reason that it is plausible. And then second, the reason given is by not dividing counties and in forming legislative districts, there is less voter

confusion. That may or may not be true. But I think that it's rational to think that it's true. It's not provably demonstrably beyond reasonable doubt true and I'm not too impressed by the poll in that respect. But I think that it is arguably true that maintaining county lines is likely to cause less confusion and then, third, keeping counties whole, informing legislative districts makes representatives more accountable to the voters of the county as a group. And I think that the notion by the gentleman from Cheatham County that a representative for Cheatham County is likely to be more responsive than one who represents Cheatham and Davidson County has a plausibility to it and that the accountability argument is rational.

In addition, there are a few other possible reasons that one might offer in addition to the volatility argument and these three arguments that Mr. Farmer gives in his brief.

There is some argument that the cost of holding elections because of frequent changes that result from not having a stable county line system, that that increases the cost of elections. That is a relatively minor matter. I'm sure, however, that splitting counties frequently increases the cost of campaigning for candidates where you've got to go advertise on radio stations and in newspapers across various and sundry county lines, but it does seem to me to increase the cost of campaigning and that more adherence to county lines would tend marginally to decrease costs.

And then, lastly, there is a value that does seem to me to be very important – one of clarity – that I tend to say

that clarity of the law is a very important value and expression and I think that maintaining county lines, people can understand that, and it provides a clarity to a reapportionment plan which is likely to avoid confusion and that clarity is in itself a value.

I might say in conclusion on that clarity that you gentlemen have been very clear in your own presentations; your briefs have been exceedingly well done. The Court very seldom sees a case so well tried, so well briefed by all the parties as this one. And we very much appreciate counsels' help in clarifying the issues for us; as I say, that clarity is important to me both in terms of making law and in terms of lawyers' presentations and I think you gentlemen have done that very well.

Anyway, that's the statement of my own reasons for sustaining Plan A.

JUDGE MILBURN: I would likewise echo Judge Merritt's thanks to counsel for the excellent briefs, excellent presentation and I would concur with all that Judge Merritt has so eloquently stated. My vote, therefore, is to the effect that the reapportionment plan for the Tennessee House of Representatives under Chapter 778 Public Acts 1984 is constitutional; that such which has been referred to as Plan A does reflect a rational State policy; legitimate State interests, all of which – all the points that I had in mind have been stated by Judge Merritt. Accordingly, my vote would be to dismiss this action.

JUDGE WISEMAN: Well, I concur in all of the rationale and remarks of both Judge Merritt and Judge Milburn. I would add a few things in addition thereto, not that either Mr. Willis or Knight need any defense nor

their clients or members of the Legislature need it. But I would not ascribe to the plaintiffs in this case the somewhat selfish motivations that were suggested by counsel for the intervenors. It appears to me that the Legislature when they enacted this bill and the alternative, found themselves between a rock and a hard place.

On the one hand, they had a Tennessee constitutional provision requiring adherence to county lines and the Tennessee Supreme Court decision and on the other hand, they had the Fourteenth Amendment and I think rightfully so, they have sought clarity in this court and I really would ascribe to them – Mr. Perry's motivations of seeking more resolution of the problem than seeking to win or seeking to vindicate any parochial or selfish considerations.

The whole matter needs to be put to rest.

Now, in addition to those reasons why Tennessee's long articulated State policy of adherence to county lines in reapportionment cases is one which is much more than Mr. Knight would ascribe to it, that being only a court ordered plan. I would suggest to counsel that the very first reapportionment plan that was passed for the House of Representatives of the State of Tennessee following Baker versus Carr included a long preamble, one of the considerations of which was that the county lines should be adhered to – to the extent possible – that local government entities and county governments should be adhered to. And I suggest it's far more than a court ordered plan when the constitutional provision itself was not only enacted by elected representatives, but that the plan itself

and the wording itself was approved by a referendum of the people in an overwhelming way.

Furthermore, the members of the Tennessee Supreme Court in addition to being great legal scholars are themselves elected at large in the State of Tennessee. And all of these things I think require some deference to this policy as a State policy far in excess of what I think the Court – Mr. Knight may have been considering when he talked about court ordered plans – court ordered plan of a district court that they were looking at and scrutinizing.

Finally, in addition to those reasons why I think the State policy is a valid and rational one, I would add to what Judge Merritt has said that I credit the testimony of Judge Lockert, Judge Goddard, Judge Bone, that dividing counties seriously dilutes political power and representation of county units and that county local governments do have a legitimate interest in the maintenance of the integrity of their representation in the Legislature and that this dilution should be kept to a minimum while adhering to the commands of the Fourteenth Amendment as interpreted by the Supreme Court.

I would further credit the testimony of Mr. Jacoubian and Dr. Lupfer in that dividing counties tends to discourage participation of the voter in the political process.

Furthermore, I think this is an opportunity for all of us to display adherence to another principle and that is of comity.

The Tennessee Legislature, the Tennessee Supreme Court have made an effort to comply with what has been announced in fairly definitive terms by the Supreme

Court of the United States and this Court now owes some deference to the principles of comity in trying to arrive at accommodation of conflicting principles and conflicting interests all of which, I think, is anticipated and encouraged by the Reynold versis [sic] Simms decision and its progeny.

So for the reasons announced, I would concur fully in the decision as announced by Judge Merritt.

Anything further, gentlemen? The Court will stand in recess.

(Whereupon, court was recessed.)

REPORTER'S CERTIFICATE

I, John W. Tummel, Official Court Reporter for the United States District Court, Middle District of Tennessee, with office at Nashville, hereby certify that I recorded on the Stenograph Shorthand Machine the proceedings held in open court March 8, 1985, in the matter of: Ed Murray, et al., versus Gentry Crowell, et al., Nashville Civil Case No. 3:84-0566; and that the proceedings in connection with this trial were reduced to typewriting under my supervision; and that the foregoing is a true and correct transcript of the same.

This the 3d day of April, 1985.

/s/ John W. Tummel
Official Court Reporter

STATES WITH CONSTITUTIONAL PROVISIONS PERTAINING TO MAINTAINING THE INTEGRITY OF POLITICAL SUBDIVISIONS IN REAPPORTIONMENT

STATE	LEGISLATIVE BODY	CONSTITUTIONAL PROVISION	CONSTITUTIONAL CITATION
Arkansas	Senate	No counties divided.	Art. VIII, Sec. 3
California	House/Senate	No city/county divided to extent possible without violating equal protection.	Art. XXI, Sec. 1
Colorado	House	No county divided except necessary to meet equal population requirements.	Sec. 47
Idaho	House/Senate	County divided only to extent to comply with U.S. Constitution.	Art. III, Sec. 5
Iowa	Congress	No county divided.	Art. III, Sec. 37
Kentucky	House	Redistrict as nearly as equal in population without dividing any county.	Sec. 33
Maine	House	Cross-political subdivision lines least number times to establish as nearly as practicable equally populated districts.	Art. IV, Pt.1, Sec. 2
Maryland	House	Due regard to political subdivisions.	Art. III, Sec. 4
Massachusetts	House	No town of less than 2500 shall be divided.	Art. CI, Sec. 1
Michigan	Senate	District lines shall follow city or township boundaries to extent possible.	Art. IV, Sec. 2
Missouri	Senate	No county divided except to attach to multi-district county for equal population.	Art. III, Sec. 7

STATES WITH CONSTITUTIONAL PROVISIONS PERTAINING TO MAINTAINING THE INTEGRITY OF POLITICAL SUBDIVISIONS IN REAPPORTIONMENT

STATE	LEGISLATIVE BODY	CONSTITUTIONAL PROVISION	CONSTITUTIONAL CITATION
New Jersey	House	No county or city divided unless more than 1/40 state population.	Art. IV, Sec. 2, ¶ 3
New York	House	No town less than full ratio of apportionment may be divided.	Art. III, Sec. 4
N. Carolina	Senate	No county divided.	Art. II, Sec. 3
Ohio	House	Duty to make reasonable effort to avoid dividing county.	Art. III, Sec. 9
Pennsylvania	House/Senate	Unless absolutely necesary, no county/ city may be divided.	Art. II, Sec. 16
Texas	House	Whenever county entitled to single district, it may not be divided.	Art. III, Sec. 26
Vermont	House	Seek to adhere to county boundaries.	Ch. 2, Sec. 13
West Virginia	State	Districts shall be bounded by county lines.	Art. VI, Sec. 4
Wyoming	House/Senate	Each county entitled to at least one representative.	Art. III, Sec. 3

Supreme Court, U.S.
FILED
FEB 2 1994
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No. 93-1090

In The

Supreme Court of the United States

October Term, 1993

BRYANT MILLSAPS, et al.,

Appellants,

v.

PHILLIP R. LANGSDON, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Tennessee

APPELLEES' MOTION TO DISMISS OR AFFIRM

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On Appeal From The United States District Court For The Western District Of Tennessee

APPELLEES' MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, Appellees move to dismiss this appeal or to affirm the District Court's ruling below on the ground that the unanimous decision of the three-judge District Court below was soundly based on a correct application of this Court's well-settled law, so as to warrant no further review by this Court. The questions raised by Appellants as to the unpublished opinion below are so insubstantial that they do not merit further argument.

QUESTIONS PRESENTED

A simple reading of the Opinion below reveals that Appellants' statement of the Questions Presented misstates that Opinion. Accurately stated, the questions presented are:

1. Did the District Court properly apply well-settled precedent of this Court in finding that population deviations of 13.9% in Tennessee's legislative reapportionment plan cannot reasonably further the rational state policy of preserving county lines, in the face of an apportionment plan deviating less than 10% while splitting even fewer county lines?

2. Did the District Court properly apply well-settled precedent of the Tennessee Supreme Court, which precedent followed the directives of this Court, in finding that Tennessee cannot constitutionally justify a population deviation of 13.9% in its reapportionment plan, by the rational state policy of preserving county lines, when fewer county lines may be split with a population deviation of less than 10%?

OPINION BELOW

In the closing days of the 1992 session of the Tennessee General Assembly, Chapter 836 of the Acts of 1992 was adopted, which redistricted the Tennessee House of Representatives. This bill was signed into law on April 29, 1992, less than thirty days prior to the May 21, 1992 qualifying deadline for candidates for the 1992 election. Appellees promptly challenged the constitutionality of

Chapter 836 and a three-judge panel was convened pursuant to 28 U.S.C. §2284. Appellees sought a preliminary injunction restraining Appellants from closing the qualifying period for candidates for the 1992 elections in order that relief could be obtained in time for the 1992 general elections. Appellees' request for preliminary injunction was denied and the 1992 elections were held pursuant to Chapter 836.

Thereafter, Appellees filed a Motion for Summary Judgment. This Motion was thoroughly briefed by all parties and subsequently argued. The facts were not in dispute. Chapter 836 created House districts with a total population deviation of 13.9%, while splitting thirty county lines in forming multi-county districts. Appellants' only proffered justification for the deviation was to further the rational state policy of preserving county lines. Appellees presented an alternative plan which split only twenty-six counties, but had a total population deviation of only 9.84%.

By unanimous decision of the three-judge Court announced in open court on June 21, 1993, summary judgment was granted in favor of Appellees and the State was enjoined from conducting further elections in accordance with Chapter 836. A written, but unpublished, Opinion and Order was issued by the Court below on September 15, 1993. The Court found Chapter 836 to violate the "one person, one vote" requirement of the Fourteenth Amendment, making it unnecessary to decide Appellees' additional arguments of unconstitutional partisan gerrymandering and violation of the Voting Rights Act.

The Order directed Appellants to present a new redistricting plan by December 24, 1993 or face the prospect of conducting 1994 elections under a court-ordered plan. Appellants moved to alter or amend the judgment below, seeking *inter alia* an extension of the deadline for enactment of a new redistricting plan, noting that the General Assembly was scheduled to begin its regular session on January 11, 1994. The Court below unanimously denied the substantive portions of Appellants' Motion to Alter or Amend, but granted Appellants additional time to develop a new plan of redistricting. The deadline was extended, pursuant to Appellants' request, to January 25, 1994, allowing the legislature to consider the matter in regular session.

Appellants then sought to stay imposition of the very deadline which they had previously sought, and filed a Motion for Stay. Appellants' Motion was denied by unanimous decision of the three-judge District Court. Thereafter, Appellants' Application for Stay filed in this Court was denied by Justice Stevens.

In accordance with the Order of the Court below, the Tennessee legislature, in regular session, did in fact adopt a new plan of redistricting. Chapter 536, Acts of 1994, was adopted by the House and Senate on January 19, 1994 and signed by the Governor on January 20, 1994. The act contains three alternative plans of apportionment for the House. Section 1 contains the primary plan. Section 2 provides as follows:

> If the plan of apportionment in Section 1 is declared to be invalid by a court of competent jurisdiction in a final determination of any action under the Voting Rights Act or under the

> Thirteenth, Fourteenth or Fifteenth Amendments to the United States Constitution on the grounds of dilution of minority voting strength, then the plan of apportionment for the House of Representatives shall be the plan of apportionment contained in Section 1 with the exception of the following districts which shall be composed as follows: . . .

Section 3 provides:

> If the plan of apportionment for the House of Representatives contained in Chapter 836 of the Public Acts of 1992, codified as Tennessee Code Annotated, Section 3-1-103, is determined to be constitutional and valid by a court of competent jurisdiction in a final determination of any action contesting its validity, then the plans of apportionment for the House of Representatives in Sections 1 and 2 of this act shall be null and void and such Chapter 836 of the Public Acts of 1992, codified as Tennessee Code Annotated, Section 3-1-103, shall remain the plan of apportionment for the House of Representatives.

See Appendix.

Chapter 536 of the Public Acts of 1994 has now been filed with the District Court for its review.

ARGUMENT

A. The District Court properly applied well-settled precedent of this Court in finding that population deviations of 13.9% in Tennessee's legislative reapportionment plan cannot reasonably further the rational state policy of preserving county lines, in the face of an apportionment plan deviating less than 10% while splitting even fewer county lines.

The first "Question Presented" contained in Appellants' Jurisdictional Statement is an incorrect statement of the ruling of the District Court below. The District Court did not declare, or even intimate, that the 13.9% deviation in the State's reapportionment plan constituted a *per se* violation of the equal protection clause. Likewise, the District Court, contrary to Appellants' assertion, did not preclude consideration of justification for the deviation. The District Court considered everything the State put before it.

This Court has clearly provided the applicable standard of analysis for these types of cases. That standard of analysis is described in Appellants' Jurisdictional Statement (page 10) and is not at issue in this case. Beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has held that the equal protection clause mandates that states reapportion their legislatures according to population. However, some divergences are constitutionally permissible provided that they are based on "legitimate considerations incident to the effectuation of a rational state policy." Population deviations of 10% or less are presumed valid. *White v. Regester*, 412 U.S. 1055 (1973). However, where a population deviation exceeds 10%, an

inquiry is required as to whether the plan reasonably furthers a rational state policy and, if so, whether the divergences are also within tolerable limits. *Mahan v. Howell*, 410 U.S. 315 (1973).

In applying that standard of analysis to the facts of this case, Appellants admit that Chapter 836 contained a population variance of 13.9% and split thirty of the ninety-five counties in Tennessee. Appellants concede that where the population variance exceeds 10%, as here, they have the burden of proof to show that the variance "reasonably furthers a rational state policy." The parties below agreed that preserving county lines is a rational state policy. Appellants contended below that the 13.9% variance reasonably furthered that rational state policy. Appellees, however, filed with the Court an Alternative Plan which contained a population variance of 9.84%, and yet split only twenty-six counties. This Alternative Plan conclusively proved that the 13.9% variance of Chapter 836 was not necessary to the furtherance of state policy, and in fact, operated in derogation of that policy.[1]

---

[1] This finding is further supported by the plans which have surfaced since the Court's opinion. The Rural West Tennessee Plaintiffs filed with the District Court on December 13, 1993 a plan which has a variance of 9.99% and splits 28 counties. Section 1 of Chapter 536 contains a plan which has a variance of 9.96% and splits 29 counties. Section 2 of Chapter 536 contains a plan which also has a variance of 9.96% and splits 30 counties. An amendment to Chapter 536 was offered in committee which has a variance of 9.76% and splits 21 counties. Another amendment was offered on the floor of the House which has a variance of 9.87% and splits 21 counties. Thus, the point made by the Plaintiffs' alternative plan – that it was not necessary to exceed 10% variance in order to preserve county lines – has now been

The Court below properly undertook the analysis dictated by this Court. Rather than precluding consideration of any justification for the population deviation in Chapter 836, the Court below considered, and rejected, the justification advanced by Appellants. The only rationale advanced by Appellants below for the excessive variance of Chapter 836 was preservation of county lines. In fact, Appellants argued below it was *they* who were entitled to summary judgment; that the facts were not in dispute and their rationale was before the Court. Brief in Response to Motion for Summary Judgment, pages 4, 7, filed as Exhibit "A" to Appellees' Response to Application for Stay.

Appellants' claim that they were precluded from offering additional proof has already been rejected. See Order of the Three-Judge Court, Appellants' Appendix 5a, 6a. At the Summary Judgment stage, Appellants offered no other rationale for their deviation. Thus, Appellants' claim that they were precluded from doing so misstates the record.

Since the Court below considered, and rejected, Appellants' rationale for the excessive deviation, Appellants cannot support their argument that the Court reduced the analysis of this case to a wholly mathematical exercise, or found a *per se* violation as Appellants suggest. As the Court below succinctly stated, "It is patently unreasonable to justify a 14% variance on the basis of not splitting county lines when fewer counties may be

---

reinforced by five additional plans which achieve the same result.

split while simultaneously *decreasing* that variance below the 10% goal." Opinion and Order of the Three-Judge Court, Appellants' Appendix, page 17a.

Voinovich v. Quilter, 113 S.Ct. 1149 (1993), cited in Appellants' Jurisdictional Statement, is inapplicable. In *Voinovich,* the District Court held that total deviations in excess of 10% cannot ever be justified by a policy of preserving the boundaries of political subdivisions, and therefore, had made a *per se,* wholly mathematical analysis. In contrast, the District Court in this case specifically considered whether, under the facts of this case, the preservation of county lines justified the variances in Chapter 836, and found that it did not. Thus, the Court below made the analysis required by *Voinovich* and found the State's proof wanting.

B. The District Court properly applied well-settled precedent of the Tennessee Supreme Court, which precedent followed the directives of this Court, in finding that Tennessee cannot constitutionally justify a population deviation of 13.9% in its reapportionment plan by the rational state policy of preserving county lines, when fewer county lines may be split with a population deviation of less than 10%.

Appellants' second "Question Presented" erroneously accuses the District Court of "intruding" upon the state reapportionment process by redefining the Tennessee Supreme Court's stated policy in reapportionment cases. Appellants assert that the Tennessee Supreme Court in *State ex rel Lockert v. Crowell,* 656 S.W.2d 836 (Tenn. 1983) [*Lockert II*] established a state policy that any

plan falling below a 14% deviation limit and a thirty county division limit is permissible. Appellants claim that since Chapter 836 falls within these limits, it is constitutionally acceptable.

Appellants misconstrue both *Lockert II* and the Opinion below. To read *Lockert II* as Appellants do, not only reduces the analysis to a wholly mathematical exercise (something to which Appellants themselves strenuously object) but also fails to comply with this Court's directives. As the District Court observed, "This argument misses the point of the three-part test." Opinion of Three-Judge Court, Appellants' Appendix, page 13a. Appellants advanced the same reading of *Lockert II* below, prompting the District Court to comment that the argument "fails under a careful reading of the *Lockert II* opinion itself." Opinion of Three-Judge Court, Appellants' Appendix, page 13a. The District Court correctly recognized that nowhere in the *Lockert II* opinion does the Tennessee Supreme Court purport to establish an absolute numerical standard. Opinion of Three-Judge Court, Appellants' Appendix, page 14a.

To accept Appellants' argument of the meaning of *Lockert II*, would be to completely ignore the mandate of this Court as set forth in *Mahan v. Howell, supra.* However, the Tennessee Supreme Court in *Lockert II* embraced that mandate. In *Lockert II*, the Tennessee Supreme Court stated:

> This Court is not persuaded . . . that we should sanction a single county line violation not shown to be necessary to avoid a breach of federal constitutional requirements. We adhere

> to the law of this case established in our Opinion released on March 31, 1982. *Lockert II, supra,* at 839.

The Opinion of March 31, 1982, *State ex rel Lockert v. Crowell,* 631 S.W.2d 702 (Tenn. 1982) [*Lockert I*] had stated:

> The provisions of the Tennessee Constitution, although of secondary import to equal protection requirements, are nonetheless valid and must be enforced insofar as possible. If the state is correct in its insistence that there is no way to comply with the mandates of the federal and state constitutions without crossing county lines, then we hold that the plan adopted must cross as few lines as is necessary to comply with the federal constitutional requirements.

Id., at 714, 715.

The Tennessee Supreme Court could hardly be more clear that its policy is to require a plan to cross as few county lines as necessary, while complying with federal constitutional requirements. The decision of the Court below was entirely in keeping with *Lockert II* and *Lincoln County v. Crowell,* 701 S.W.2d 602 (Tenn. 1985). What Appellants fail to recognize is that in each of those cases, the State was able to support its asserted justification for the deviation. In this case, the State's justification cannot be supported by the rationale it advanced.

The fact that the District Court did not "redefine" state policy as expressed in *Lockert II,* is not the only proof that it did not "breach the important doctrine of federalism by interfering with the state reapportionment process." Appellants' claim that the three-judge panel "has removed much of the task of reapportioning from

the hands of the elected representatives of the State of Tennessee and made it a mathematical exercise" (Jurisdictional Statement, page 18) is baseless. The District Court noted in its Opinion the importance of the state legislative process in reapportionment and has made every effort to avoid imposition of a judicial plan. The District Court even delayed the deadline contained in its Opinion in order to permit the state legislature to act in regular session rather than call a special session.

This fact alone distinguishes this case from *Growe v. Emison*, 113 S.Ct. 1075 (1993), upon which Appellants rely in their Jurisdictional Statement. In *Growe*, the District Court had adopted its own plan in the face of state court action, and had enjoined the state court from issuing its own redistricting plan. In this case, on the other hand, the District Court actively encouraged the state's development of its own redistricting plan. In fact, Judge Merritt, speaking for the three-judge District Court, announced the Court's decision orally from the bench on June 21, 1993, including the fact that the Court would permit the legislature another chance to draw an acceptable plan. The legislature thus has had seven months in which to act. The fact that the legislature has acted further proves that the District Court properly deferred to the state legislative process. It is important to note that *Growe* recognized that deferral, *not* abstention, is required, and that the imposition of a deadline for legislative action is entirely appropriate. *Id.* at 1082. The fixing of a deadline for legislative action at a time requested by the Appellants and which they have now met can hardly be "undue interference."

C. The questions presented by the unpublished opinion below are so insubstantial that they do not merit further argument.

This case presents no basis for reconsidering this Court's well-settled standards in apportionment cases. No novel issues and no substantial federal questions are raised by this unpublished opinion. Unlike *Karcher v. Daggett*, 455 U.S. 1303, 102 S.Ct. 1298, 71 L.Ed.2d 635 (1982), this case does not require this Court to further clarify any of its reapportionment standards in light of a District Court divided on an issue of interpretation. The District Court's unanimous decision was well-reasoned and properly applied the facts before it to existing law.

Appellants make much of the fact that at least twenty other states have some type of provision in their state constitution pertaining to maintaining the integrity of political subdivisions in reapportioning their legislative bodies. There is no dispute whatsoever that preserving the boundaries of political subdivisions is a rational state policy. The State here had only to prove that its excessive population deviations *furthered* that policy. This it failed to do. There are no questions raised here which would have any impact on other states in their reapportionment process.

Appellants complain that "one of the major difficulties in legislative reapportionment is the lack of clear standards to guide a state legislature in fulfilling its constitutional obligations." Jurisdictional Statement, page 16. To the contrary, the standards are quite clear. As the District Court noted in its unanimous opinion, "The Supreme Court has spoken concerning applicable federal

Constitutional standards." Appellants' Appendix, page 9a. If a reapportionment plan has a population deviation which exceeds 10%, the state must justify the deviation with a rational state policy. This the State of Tennessee failed to do in this case.

By their questions presented, Appellants cite two reasons why this Court should note probable jurisdiction in this case. However, because the questions presented in Appellants' Jurisdictional Statement misstate the record below and the opinion of the District Court, Appellants' assertions have no basis either in the law or in the record. Accordingly, there is no basis for noting jurisdiction.

CONCLUSION

The three-judge District Court was correct in its unanimous, unpublished opinion finding that Appellants failed to prove that the population deviations of Chapter 836 reasonably furthered the rational state policy Appellants advanced. The Court below did not preclude Appellants' opportunity to justify the population deviation of Chapter 836. Rather, Appellants offered a justification which they were logically incapable of proving. The Court below merely applied existing state and federal law in finding that the variances in Chapter 836 bore no relationship to the purported justification of adherence to a rational state policy of preserving county boundaries.

This case warrants no further review by this Court. The questions presented are insubstantial and the

decision below was correct. The appeal should be dismissed and the judgment below affirmed.

Respectfully submitted,

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Date: February 2, 1994

APPENDIX

STATE OF TENNESSEE

PUBLIC CHAPTER NO. 536

SENATE BILL NO. 592

By Rochelle

Substituted for House Bill No. 776

By Ridgeway, Purcell, DeBerry

AN ACT Relative to state representative districts and to amend Tennessee Code Annotated, Section 3-1-103.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 3-1-103, is amended by deleting the section in its entirety and by substituting instead the following:

> Section 3-1-103: (a) (1) All census descriptions, counties, tracts, blocks, census delineations, census district lines and other census designations are those established for or by the United States Department of Commerce, Bureau of the Census, for taking the 1990 federal decennial census in Tennessee as contained in the automated geographic data base, known as the TIGER (Topologically Integrated Geographic Encoding and Referencing) System. All voting districts (VTDs) are precincts aggregated from such census blocks as reported to the Office of Management Information Services for the General Assembly by the Office of Local Government, Comptroller of the Treasury pursuant to the provisions of Tennessee Code Annotated, Title 2, Chapter 3, Part 1.

(2) All subdivisions listed under a county are voting districts (VTDs) unless labeled as tracts and blocks.

(b) It is the intention of the general assembly that:

(1) Each district be represented by a single member;

(2) Districts must be substantially equal in population in accordance with constitutional requirements for "one person one vote";

(3) Geographic areas, boundaries and population counts used for redistricting shall be based on the 1990 federal decennial census;

(4) Districts must be contiguous and contiguity by water is sufficient;

(5) No more than thirty (30) counties may be split to attach to other counties or parts of counties to form multi-county districts; and

(6) The redistricting plan will comply with the Voting Rights Act and the fourteenth and fifteenth amendments to the United States Constitution.

(c) Until the next enumeration of qualified voters and apportionment of representatives, the State House of Representatives shall be composed as follows:

[Subsection (c) contains the block/tract census data assignments for all 99 house districts which has been omitted due to that fact that such data

is of a technical nature and would be of no assistance to this Court.]

(d) Nothing in this section shall be construed as depriving any member of the House of Representatives of the Ninety-eight General Assembly of such member's office, or as affecting or modifying the constitutional requirements of the provisions of Article II, Section 3 of the Constitution of Tennessee. At the November, 1994 general election, and thereafter until changed by law, representatives shall be elected to represent the districts as constituted and provided by this section. If the seat of a member of the House of Representatives becomes vacant prior to the general election in which a representative is to be elected to represent the district as constituted and provided by this section, in accordance with Article II, Section 15 of the Constitution of Tennessee, a successor shall be elected by the county legislative body to represent the district.

(e) It is the legislative intent that all House of Representatives districts shall be contiguous and, toward that end, if any voting district or other geographical entity designated as a portion of a district is found to be noncontiguous with the larger portion of such district, it shall be constituted a portion of the district smallest in population to which it is contiguous. Similarly, if any area is found not to be included in a representative district, that non-included area should be included in the district smallest in population to which it is contiguous.

(f) Any reapportionment of county legislative bodies shall not affect these legislative districts.

SECTION 2. If the plan of apportionment in Section 1 is declared to be invalid by a court of competent jurisdiction in a final determination of any action under the Voting Rights Act or under the Thirteenth, Fourteenth or Fifteenth Amendments to the United States Constitution on the grounds of dilution of minority voting strength, then the plan of apportionment for the House of Representatives shall be the plan of apportionment contained in Section 1 with the exception of the following districts which shall be composed as follows:

[The balance of Section 2 contains the block/tract census data assignments for all 99 house districts which has been omitted due to that fact that such data is of a technical nature and would be of no assistance to this Court.]

SECTION 3. If the plan of apportionment for the House of Representatives contained in Chapter 836 of the Public Acts of 1992, codified as Tennessee Code Annotated, Section 3-1-103, is determined to be constitutional and valid by a court of competent jurisdiction in a final determination of any action contesting its validity, then the plans of apportionment for the House of Representatives in Sections 1 and 2 of this act shall be null and void and such Chapter 836 of the Public Acts of 1992, codified as Tennessee Code Annotated, Section 3-1-103, shall remain the plan of apportionment for the House of Representatives.

SECTION 4. This act shall take effect upon becoming a law, the public welfare requiring it.

SENATE BILL NO. 592

PASSED: January 19, 1994

/s/ John S. Wilder
JOHN S. WILDER,
SPEAKER OF THE SENATE

/s/ Jimmy Naifeh
JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 20th day of January 1994

/s/ Ned McWherter
NED McWHERTER, GOVERNOR

FEB 17 1994
OFFICE OF THE CLERK

No. 93-1090

In The

Supreme Court of the United States

October Term, 1993

BRYANT MILLSAPS, et al.,

Appellants,

v.

PHILLIP R. LANGSDON, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Tennessee

REPLY BRIEF

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ARGUMENT

The decision of the district court published as *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter,* 836 F. Supp. 447 (W.D. Tenn. 1993) is in conflict with a decision of a three-judge panel from Maryland issued on January 14, 1994 in the case of *Marylanders for Fair Representation, Inc. v. Schaefer,* slip op., pp. 22-26 (D. Md. 1994) (copy of opinion which totals 110 pages is lodged with the Clerk of this Court). The *Marylanders* Court was confronted with a reapportionment plan for the House of Delegates with a population deviation of 10.67%. In discussing the standard for determining the constitutionality of a plan over the de minimus of 10%, the *Marylanders* Court stated the following:

> MFR [Marylanders for Fair Representation], claiming to state the standard enunciated in *Voinvoich,* argues that the State must demonstrate that the deviation is *required* in order to advance a rational state policy. *See* Opp'n Mem. at 6. This is simply not the standard that has been established for evaluating deviations in state legislative redistricting plans. Rather, MFR has stated the test for *congressional* redistricting cases as set out in *Karcher,* 462 U.S. at 741. The *Karcher* decision is applicable to state legislative redistricting cases to the extent that it expressly recognizes several state policies that might justify deviations from population equality. The requirement in *Karcher* that the asserted state policy actually be the reason for the deviation is equally applicable to state redistricting cases. However, it is well established that the one person, one vote standard for congressional redistricting is far more demanding than the

> standard for legislative redistricting plans. *See Mahan*, 410 U.S. at 321-22; *Reynolds*, 377 U.S. at 578. As the defendants correctly point out, the appropriate test to be applied in state legislative redistricting cases is more akin to a rational basis test.

Marylanders, slip op. at 13-14.

In this case, the district court followed the "required" standard in *Karcher* for congressional districts instead of the rational basis test for state legislative districts as stated in the *Marylanders* case. Since the district court embraced the plaintiffs' hypothetical plan as furthering the state's interest in maintaining the integrity of county lines while keeping the deviation under 10%, the deviation of 13.9% under Chapter 836 could not under the rationale of the district court be "required" to further the state's rational policy regarding the division of counties. This standard is higher than the rational basis test and was rejected by the district court in the *Marylanders* case for state legislative districts. Such a conflict between these two three-judge panels provides a sufficient basis for this court to note probable jurisdiction in this case.

The *Marylanders* Court also recognized the state policies which might justify a deviation above 10% including "respecting the boundaries of political subdivisions, preserving cores of prior districts, avoiding contests between incumbents, and due regard for natural boundaries." *Marylanders*, slip op. at 23 (citations omitted). By holding that the plaintiffs' alternate plan requires a reapportionment plan of under 10%, the district court in this case has precluded as a matter of law consideration of any justifications for the 13.9% deviation in Chapter 836. Indeed,

the district court subsequently rejected two justifications asserted by the defendants: (1) failure of the plaintiffs' hypothetical plan to comply with the Voting Rights Act by packing at least five districts with 70% to 96% African-American voting age population; (2) consideration by the Tennessee General Assembly of the census undercount in urban areas such as Davidson County-Nashville where the deviations exceed negative 5% in order to compensate for disproportionate undercounting of minorities in those areas.

CONCLUSION

By embracing the plaintiffs' hypothetical plan, which has a deviation of under 10% and divides fewer counties than Chapter 836, the district court has precluded the defendants as a matter of law from introducing any rational state policies to justify the 13.9% deviation. As the *Marylanders* Court stated, the standard is not that "the State must demonstrate that the deviation is *required* in order to advance a rational state policy," but the "appropriate test to be applied in state legislative redistricting cases is more akin to a rational basis." *Marylanders*, slip op. at 13-14. The defendants have not been given the opportunity in this case to justify the deviation under

such a rational basis test. Accordingly, this Court should note probable jurisdiction.

Respectfully submitted,

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